TABLE OF CONTENTS

	Page
ION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE APPELLEES ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND AND HUMAN RIGHTS FOR WOMEN, INC.	1
F AS AMICI CURIAE IN SUPPORT OF APPELLEES ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND AND HUMAN RIGHTS FOR WOMEN, INC.	5
ement of Interest of Amici Curiae	5
oduction and Summary of Argument	6
gument	7
I. Disabilities Related to Pregnancy Cannot Be Distinguished From Other Conditions Included in the California Plan on the Grounds That They Are Not Illnesses or Injuries	7
A. Neither the Lay Terms "Illness" and "Injury" Nor the Medical Term "Disease" Exclude Disabilities Arising From Pregnancy	8
B. The Disabilities Which Are Covered By the California Plan Indicate That the Terms "Illness" and "Injury" Include Physiological Conditions That Cannot Be Distinguished From Pregnancy-Related Disabilities	12
C. The Fact That Disabilities Related to Pregnancy Are Statistically Common Does Not Justify Their Exclusion From Coverage Under The California Plan	13
II. Pregnancy-Related Disabilities Are No More Voluntary Than Other Conditions Covered By the State's Plan	13
III. Pregnancy-Related Disabilities Are No More Subject to Planning Than Other Conditions Covered by the California Plan	17

TABLE OF CONTENTS—Continued

Page

IV. Medical Disagreement Regarding the Duration and Severity of Pregnancy-Related Disabilities Is No Greater Than the Disagreement Regarding Other Disabilities Covered By the California Plan 18

A. Physicians Disagree as to the Duration and Severity of Many Disabilities Included in the California Plan 18

B. Appellant Has Overstated Physicians' Disagreement As To the Duration and Severity of Pregnancy-Related Disabilities 20

Conclusion 24

AUTHORITIES CITED

Cases: Page

Gilbert v. *General Electric Co.*, No. 142-72-R (E.D. Va., filed March 15, 1972) ..... *passim*

Greenwood v. *United States*, 350 U.S. 366 (1956) .. 19

Memorial Hospital, et al. v. *Maricopal County, et al.*, 42 U.S.L.W. 4277 (Feb. 26, 1974) 6

Rentzer v. *California Unemployment Ins. Appeals Bd.*, 32 Cal. App. 3d 604 (1973) 6

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 6

Statutes:

California Unemployment Insurance Code, Section 2626, 2626.2 (Stats. 1953, c.308 p.1531, as amended, January 1, 1974) ..... *passim*

Miscellaneous:

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Policy Statement on Pregnancy-Related Disabilities*, March 2, 1974 22

BECK, OBSTETRICAL PRACTICES (6th ed. 1955) 11, 12

BIORCK, *The Return to Work of Patients With Myocardial Infarction*, 17 JOURNAL OF CHRONIC DISEASES 653 (1964) 19

BUMPASS & WESTOFF, *The "Perfect Contraceptive" Population*. 169 SCIENCE, 1177 (1970) 14

DORLAND, 24th ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965) 9, 12

OSCAR HARKAVY & JOHN MAIER, *Research in Reproductive Biology and Contraceptive Technology: Present Status and Needs for the Future*, FAMILY PLANNING PERSPECTIVES, vol. 2, No. 3 (June 1970) 15

KAUFMAN & BECKER, *Rehabilitation of the Patient With Myocardial Infarction*, 10 GERIATRICS 355 (1955) 18

NAGLE, GANZOLA & PICTON-ROBINSON, *Factors Influencing Return to Work After Myocardial Infarction*, THE LANCET (Aug. 28, 1971) 18

AUTHORITIES—Continued

Page

NAUGHTON, BRUHN, LATEGOLA & WHITSELT, *Rehabilitation Following Myocardial Infarction*, AMERICAN JOURNAL OF MEDICINE 210 (May 1969) 19

NIMH, *Preliminary Findings From the Psychiatric Inventory of St. Elizabeth's Hospital* (May 1970) 20

Thomas S. Szasz, *The Right to Health*, 57 GEORGETOWN L.J. 734 (1969) 19

TENNY & LITTLE, CLINICAL OBSTETRICS (1961) 11

VORHERR, *Puerperium, Maternal Involutional Changes and Lactation*, in GYNECOLOGY AND OBSTETRICS, rev. ed., vol. 1, chap. 20 (Davis ed. 1972) 11

WESTOFF & WESTOFF, FROM NOW TO ZERO; FERTILITY CONTRACEPTION AND ABORTION IN AMERICA (1971) 14, 15

WIGLE, SYMINGTON, LEWIS, CONNELL & PARKER, *Return to Work After Myocardial Infarction*, CANADIAN MEDICAL ASSOCIATION JOURNAL (Feb. 6, 1971) 18

WILLIAMS, OBSTETRICS (1966) 9, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE APPELLEES ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND AND HUMAN RIGHTS FOR WOMEN, INC.

The Women's Equity Action League Educational and Legal Defense Fund (hereinafter "WEAL Fund") and Human Rights for Women, Inc. (hereinafter "HRW") hereby respectfully move, pursuant to Rule 42 of the

Rules of this Court, for leave to file the attached brief as Amici Curiae in support of Appellees in this case. The consent of both the Appellant and the Appellees has been obtained and filed with the Clerk of this Court.

WEAL Fund is a non-profit, tax-exempt corporation organized to provide legal assistance and services to ensure the full recognition and participation of individuals in all facets of American life without discrimination based on sex. HRW is a non-profit, tax-exempt organization whose purposes are to provide volunteer legal assistance in litigation involving rights of women under the law, to undertake research on issues relevant to discrimination against women, and to provide for educational projects on conditions concerning women.

Both groups have participated as Amici Curiae in *Gilbert* v. *General Electric Co.*, No. 142-72-R (E.D. Va., filed March 15, 1972), a pending case which addresses many of the same issues raised by the case at bar.[1] *Gilbert* v. *General Electric Co.* concerns the sickness and accident insurance plan provided by General Electric to its employees as a fringe benefit of employment. It is similar to the original California State disability insurance plan at issue in that all disabilities are covered except those related to pregnancy. Many of the arguments and much of the evidence considered in the *Gilbert* case, therefore, is also relevant to the case now before this Court.

In particular, substantial medical evidence was introduced in the *Gilbert* case comparing the excluded pregnancy-related disabilities with the disabilities which were

[1] Women's Equity Action League (hereinafter "WEAL"), rather than the WEAL Fund, was an Amicus in the *Gilbert* case. The WEAL Fund was established by WEAL in order to assume the function of providing legal services to further the common goal of both groups—the elimination of sex discrimination. However, the WEAL Fund did not actively commence its activities until after WEAL participation in the *Gilbert* case was begun.

insured by the company. In the attached brief, Amici will discuss this medical evidence and demonstrate that it supports the position of Appellees that no valid distinctions can be drawn between the disabilities insured by the California State insurance plan and the pregnancy-related disabilities which are excluded.

CONCLUSION

For the foregoing reasons, Amici request that the Motion to File Brief As Amici Curiae in Support of the Appellees should be granted.

Respectfully submitted,

/s/ Joseph N. Onek
JOSEPH N. ONEK

/s/ Marcia D. Greenberger
MARCIA D. GREENBERGER

Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036

Attorneys for Women's Equity Action League Educational and Legal Defense Fund and Human Rights for Women, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

---

BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND AND HUMAN RIGHTS FOR WOMEN, INC.

STATEMENT OF INTEREST OF AMICI CURIAE

The interest of Amici Curiae is fully described in the Motion for Leave to File Brief As Amici Curiae above.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether the State of California can constitutionally exclude disabilities related to "normal pregnancies" from coverage under its disability insurance program.[2] California has stated that its objective in excluding such benefits is to limit the costs of the program.[3] Certainly cost control is a valid legislative objective. However, it cannot be achieved in a manner which violates the equal protection guarantees of the fourteenth amendment.[4] At the least, the State must have a rational basis for selecting its particular method of furthering economy.[5] The State, for example, could not control the costs of its program by excluding from coverage all persons with blue eyes. Nor could it control the costs by arbitrarily excluding from coverage a particular type of injury—such as broken legs. Amici contend that the State of California is similarly precluded from achieving

---

[2] Initially the State excluded all pregnancy-related disabilities from coverage under the Act. As a result of a state court's interpretation of the original statute, California Unemployment Insurance Code, Section 2626 (Stats. 1953, c.308 p.1531) in *Rentzer* v. *California Unemployment Ins. Appeals Bd.*, 32 Cal. App. 3d 604 (1973), and the amendment to the statute effective January 1, 1974, only disabilities that do not arise from "an abnormal and involuntary complication of pregnancy" are excluded from coverage. The State apparently takes the position that under the new law only disabilities arising from "normal" pregnancies are excluded from coverage. *See* Appellant's Brief at 3-4.

[3] *See* Appellant's Brief at 13-15, where the four reasons for excluding benefits are listed, and the State explains that the first three are designed to further "fiscal objectives," while the fourth reflects a legislative policy decision based in part on Rhode Island's experience of the costs of coverage.

[4] *See Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Memorial Hospital, et al.* v. *Maricopal County, et al.*, 42 U.S.L.W. 4277, 4281 (Feb. 26, 1974).

[5] Amici will not address the issue of the proper standard of review to be applied in this case, for this issue is fully covered in other briefs.

cost control by excluding disabilities arising from normal pregnancies.

California attempts to justify its decision to exclude coverage for disabilities related to "normal pregnancies" as a method of cost control "[b]ecause pregnancy-related absences are not physiologically comparable to illness or injury . . . ."[6] In this brief, Amici will focus on the question of whether, as a "physiological" or medical matter, disabilities caused by normal pregnancies can be distinguished from the other disabilities covered by the California program.

California contends that the pregnancy-related disabilities are unlike the other disabling conditions which are insured because they are normal, voluntary, subject to planning, and because there is disagreement as to the criteria for determining the period of disability. Amici will demonstrate that, in fact, these characteristics cannot all be applied to disabilities related to the normal pregnancy, nor do they serve to distinguish such disabilities from other disabling conditions insured by the California program.

ARGUMENT

I. Disabilities Related to Pregnancy Cannot Be Distinguished From Other Conditions Included in the California Plan on the Grounds That They Are Not Illnesses or Injuries.

A basic issue in this case is whether pregnancy-related *disabilities* are, as a physiological matter, any less illnesses or injuries than the other disabilities covered by the California disability insurance plan. Appellant's emphasis on the fact that pregnancy per se may be considered a normal condition and not an illness or injury

[6] Appellant's Brief at 14.

is irrelevant.[7] Appellees do not claim that women should be entitled to benefits under the California plan simply because they are pregnant, but only that they be covered if their pregnancy results in disability requiring a work absence. By failing to focus on the nature of the *disabilities* associated with pregnancy, Appellant has failed to confront this basic issue.

A. *Neither the Lay Terms "Illness" and "Injury" Nor the Medical Term "Disease" Exclude Disabilities Arising From Pregnancy.*

The California Unemployment Insurance Code provides for a program which insures California workers against disabilities requiring absences from work. Section 2626 defines disabilities to include "both mental or physical illness, [and] mental or physical injury . . . ," but, with regard to pregnancy-related disabilities, section 2626.2 states that only such disabilities caused by "an abnormal and involuntary complication of pregnancy . . ." are included.[8] The State argues that pregnancy-related disabilities were excluded from coverage because pregnancy is "neither illness nor injury . . . ."[9] However, when the terms "illness" or "injury" are examined, it becomes clear that the disabilities caused by pregnancy are as much illnesses or injuries as other disabilities covered by the plan.

The statutory words "illness" and "injury" are not in fact medical terms. Instead, they are used by laymen, and refer to general, subjective conditions whose common thread is disability. Dr. Andre Hellegers, an expert witness for plaintiffs at trial in *Gilbert* v. *General Electric*

---

[7] *See* Appellant's Brief at 17-19.

[8] California Unemployment Insurance Code §§ 2626, 2626.2 (Stats. 1953, c.308 p.1531, as amended, January 1, 1974).

[9] Appellant's Brief at 17.

Co., No. 142-72-R (E.D. Va., filed March 15, 1972), has explained that terms such as "illness" or "sickness" are terms used by laymen to describe the way they feel, rather than terms which denote discrete medical conditions.[10] Similarly, Dr. George Wilbanks, an expert witness at trial for defendants in the *Gilbert* case, stated that lay persons use the terms "illness" or "sickness" to mean a "poor feeling," while " 'disease' as used by the medical person, would be critically defined as a definite condition." [11]

There can be no question that during the period of disability associated with the most normal of pregnancies—labor, delivery (parturition) and at least the early stages of recovery (puerperium)—women suffer discomfort, pain, and would be considered as feeling "poorly" or ill.[12] Appellant has agreed that during this period, women

---

[10] Dr. Andre Hellegers' discussion of the term "illness" is found at *Gilbert* v. *General Electric Co.*, *supra*, Transcript of Trial, July 24-26, 1973 (hereinafter "*Gilbert* Transcript"), at 243. An affidavit of Dr. Hellegers, describing his expertise, has been submitted by Appellant in this case in its Appendix at 43.

[11] *See Gilbert* Transcript at 577. There are a variety of acceptable medical definitions of the technical term "disease." It has been defined most often as "a condition which, if not corrected, could lead to further debility and untimely death;" but also to be an "inability to function;" "a statistical deviation from the average;" or "an abnormal state which is deleterious to the patient." The World Health Organization has defined the term as "the absence of a sense of total physical, psychological, or social well-being." Testimony of Dr. Andre Hellegers, *Gilbert* Transcript at 242-243. According to DORLAND, 24th ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965) 428, a disease is "a definite morbid process having a characteristic train of symptoms. It may affect the whole body or any of its parts, and its ideology, pathology, and prognosis may be known or unknown."

[12] *See* WILLIAMS, OBSTETRICS (1966), 397, 399, which discusses the pain involved in labor and childbirth. The average duration of labor for a woman delivering her first baby is twelve hours, and the average duration for later deliveries is eight hours. Moreover, drugs

are physically unable to work.[13] Certainly, then, pregnancy-related disabilities must fall within the meaning of the lay term "illness." The California legislature apparently recognized this fact, and therefore expressly excluded disabilities related to normal pregnancy from coverage under the Act.

Moreover, the disabilities associated with normal pregnancies even fit within the most common definition of the more technical term "disease"—a condition which, if not corrected, could lead to further debility.[14] During birth, the vaginal tissues will most likely rip; and if the opening is not properly repaired, Dr. Hellegers has stated that a woman would have a diseased condition, causing her discomfort for the rest of her life. Therefore, virtually every birth in the United States involves the surgical procedure of an episiotomy, a cutting of the tissue between the posterior opening of the vagina and the rectum to provide an opening large enough for the baby's head to pass through.[15] The operation is performed because an incision is easier to repair than a tear. The repair is done with absorbable sutures, usually under

---

and narcotics are often prescribed for pains occurring after childbirth. *Id.*, at 482.

Dr. David Forrest, an obstetrician and gynecologist, who was an expert witness for plaintiffs at trial in *Gilbert* v. *General Electric Co.*, *supra*, testified that from the evidence of the need for an anesthetic, at least for the episiotomy which is performed in virtually every case, all women suffer discomfort during labor and delivery. *See Gilbert* Transcript at 89. *See also* testimony of Dr. Wilbanks, *Gilbert* Transcript at 586; testimony of Dr. Hellegers, *Gilbert* Transcript at 332.

[13] Appellant's Brief at 20.

[14] *See* note 11, *supra*.

[15] The procedure can only be performed by a licensed doctor or nurse midwife. Testimony of Dr. Hellegers, *Gilbert* Transcript at 331.

anesthesia, and the sutures and anesthesia are the same kinds that are used in other surgical procedures.[16]

Moreover, the usual practice in the United States is to hospitalize women during labor and delivery because medical presence during this period is necessary to ensure that the process is completed without other emergency complications arising. During birth, in addition to performing the episiotomy, the physician guides the infant's head, and, if necessary, prevents the baby from emerging too quickly.[17]

Similarly, after the birth, hospitalization is continued at least for a short period of time. The condition of the birth passages in the early days of puerperium has been compared to an open wound, with the attendant dangers of infection.[18] Dilation and partial dysfunction of the renal pelvis and uretic and urinary bladder occur which foster the development of urinary tract infections.[19]

---

[16] *See* testimony of Dr. Hellegers in *Gilbert* Transcript at 330-332.

[17] *See* testimony of Dr. Hellegers in *Gilbert* Transcript at 330. These functions certainly go beyond hand-holding and rubbing backs, which were highlighted by Appellant as Dr. Hellegers' testimony in its Brief at 31, fn.48.

[18] In BECK, OBSTETRICAL PRACTICE (6th ed. 1955), 388, it is stated: "Following labor, the birth passages are the seat of lacerations, which serve as possible portals of entrance for virulent bacteria. In addition, the relaxed condition of the vagina and pelvic floor leaves the introitus [external opening] more patulous [exposed] than normal. For these reasons, the vulva should be regarded as an open wound during the early days of the puerperium, and every precaution should be taken to protect against its infection."

[19] TENNY & LITTLE, CLINICAL OBSTETRICS (1961), 398. *See also* WILLIAMS, *supra* at 479, and VORHERR, *Puerperium, Maternal Involutional Changes and Lactation*, in GYYNECOLOGY AND OBSTETRICS, rev. ed., vol. 1, chap. 20 (Davis, ed. 1972), 11, which states:

"The urinary bladder also frequently is traumatized during delivery, whereupon it becomes edematoric and hyperemic."

In addition, leukocytosis (an increase in white blood cells) appears at this stage.[20] Again, just as when other conditions are accompanied by similar symptoms and risks, medical attendance is required in the case of disabilities related to pregnancy.

In short, even the common technical definition of "disease," which focuses on a condition which requires treatment if further debility is to be avoided,[21] surely encompasses the condition of a woman during the period she is disabled during pregnancy.

B. *The Disabilities Which Are Covered by the California Plan Indicate That the Terms "Illness" and "Injury" Include Physiological Conditions That Cannot Be Distinguished From Pregnancy-Related Disabilities.*

Because every disability necessitating absence from work is covered under the California plan except those arising from a normal pregnancy, many disabilities are insured which are not uniformly defined as "diseases." For example, disabilities caused by elective surgery, alcoholism, obesity and migraine headaches are insured by the California plan. All of these conditions, therefore, fit within the meaning of the term "illness" as used in the statute, yet none are considered to fall within every traditional medical definition of the term "disease." [22]

Hence, it is only with regard to disabilities related to pregnancy that undefined notions of "normal processes" and "physiological" distinctions are cited as justification for exclusion. When other disabilities are at issue, the only relevant question is whether absence from work

---

[20] *See* BECK, at 387; and WILLIAMS, at 484, who also describes the occurrence of lymphopenia and eosinopenia.

[21] *See* note 11, *supra*.

[22] *See* DORLAND, ILLUSTRATED MEDICAL DICTIONARY, *supra*, which excludes all of these conditions from the definition of the term "disease."

is medically necessary. Physiological distinctions between cosmetic surgery to alter physical appearance and conditions arising from cancer or heart ailments are deemed to be irrelevant. Similarly, such distinctions must be irrelevant to the issue of whether pregnancy-related disabilities are to be covered under the California plan.

C. *The Fact That Disabilities Related to Pregnancy Are Statistically Common Does Not Justify Their Exclusion From Coverage Under the California Plan.*

Appellant characterizes pregnancy as "statistically normal" and, by implication, similarly characterizes the disabilities related to normal pregnancies.[23] However, statistical frequency has played no part in excluding any other type of disability from coverage under the California plan.

For example, disabilities arising from the common cold are covered, despite the fact that virtually every worker will be disabled by a cold during his or her working career. Similarly, influenza epidemics recur almost annually, and affect vast sections of the population. Yet again, such disabilities are insured without question so long as absence from work is required. Therefore, it is only when pregnancy-related disabilities are at issue that infrequency of occurrence becomes a prerequisite to coverage.

II. Pregnancy-Related Disabilities Are No More Voluntary Than Other Conditions Covered by the State's Plan.

Appellant stresses that pregnancy is voluntary and justifies the exclusion of pregnancy-related disabilities from coverage under the California plan on this ground.[24]

---

[23] Appellant's Brief at 18.

[24] Appellant's Brief at 19.

But it is a matter of common sense that once the focus is placed where it belongs—on pregnancy-related disabilities rather than pregnancy per se—Appellant's argument has little value. Even in cases where pregnancy is desired, one could hardly contend that disabilities associated with pregnancy are also desired. The disabilities, like income taxes, may be inevitable, but they are not voluntary.

Significantly, the California plan covers elective procedures, including cosmetic surgery, where the employee has voluntarily chosen to undergo the operation. In these cases, as in pregnancy, some period of disability is inevitable. Yet the State does not contend that these disabilities are voluntary and therefore excludable from coverage.

Moreover, there are many instances where the pregnancies themselves are not desired. As abortion and adoption statistics attest, many women become pregnant involuntarily with no intention of carrying to term or of taking on the responsibilities of parenthood. Unwanted pregnancies and unwanted children are not a thing of the past.[25] Even the most effective contraceptive methods are far from fail safe,[26] and, in addition, many women cannot use them because of medical or religious reasons.

---

[25] A study by Bumpass and Westoff indicates that from 750,000 to more than 1,000,000 births annually in the United States are unwanted. *The "Perfect Contraceptive" Population.* 169 SCIENCE, 1177 (1970).

[26] "All of the (contraceptive) methods used today are imperfect in some glaring way . . . The results show that in an average year use failure rates were as follows: pill, 4 percent; IUD, 7 percent, condom, 16 percent; diaphragm, 18 percent, withdrawal, 21 percent; rhythm, 28 percent; foam, 29 percent." L.A. WESTOFF & C.F. WESTOFF, FROM NOW TO ZERO; FERTILITY CONTRACEPTION AND ABORTION IN AMERICA (1971), 68-69, 293-294.

The birth control pill is the most effective contraceptive method presently available.[27] But its safe use over long periods has not been established, and it has adverse effects on many women.[28] Other methods of contraception are also limited either by their effectiveness or because they are medically contraindicated for certain kinds of women.[29]

---

[27] *See* note 26, *supra*.

[28] One article on contraceptive technology made the following comment on oral contraceptives after noting the increased risks of thromboembolic disease in women taking the Pill:

> "Other side effects which are less well understood relate to biochemical or metabolic abnormalities observed with varying frequency in pill users. About 50 have been described thus far, and it is possible that the hormones contained in the pill produce biochemical, structural or functional alterations in every organ and tissue . . . the contraceptive effect of the pill results from interference with the extremely delicate and complex hormonal mechanisms which control the menstrual cycle, ovulation and the reproductive process. This elaborate control system is thrown out of balance, and contraception is achieved by means which can be compared to using a sledgehammer to kill a mosquito." OSCAR HARKAVY & JOHN MAIER, *Research in Reproductive Biology and Contraceptive Technology: Present Status and Needs for the Future*, FAMILY PLANNING PERSPECTIVES, vol. 2, No. 3 (June 1970), 6.

Moreover, women with high blood pressure or a family history of phlebitis are warned not to take birth control pills. *See* WESTOFF & WESTOFF, FROM NOW TO ZERO; FERTILITY CONTRACEPTION AND ABORTION IN AMERICA, *supra*, at 92-100.

Dr. Hellegers testified in *Gilbert* v. *General Electric Co.*, *supra*, that half the women who use the pill stop taking it within three years because they can no longer tolerate the side effects. *Gilbert* Transcript at 316.

[29] The effectiveness of other methods is described in note 26 *supra*. Many doctors will not insert an IUD for a woman who has never had a child or a miscarriage, or one who has undergone a previous Caesarian section. Testimony of Dr. Hellegers, *Gilbert* Transcript at 274-275; testimony of Dr. Forrest, *Gilbert* Transcript at 52. The 20 percent expulsion rate was cited as an index of the numbers of women for whom this contraceptive method is inappropriate. Testimony of Dr. Hellegers, *Gilbert* Transcript at 275.

In addition, for many women any means of contraception other than the rhythm method creates a religious dilemma. Yet this technique is considerably less effective than other available methods,[20] and, in fact, is of little use to women with irregular menstrual cycles.

Abortion remains a last resort for women whose contraceptive methods have not been effective. But there are occasions when abortions would be medically contraindicated,[21] and, as a practical matter, in certain areas of the country abortions are not available.[22] Most important, abortion is unacceptable to millions of women on moral or religious grounds, including many women who find the most effective methods of contraception unacceptable.

Finally, the fact that sexual intercourse may be voluntary, although the resulting pregnancy is unwanted, cannot serve to justify the exclusion of pregnancy-related benefits from coverage.[23] The California plan provides benefits for many disabilities which arise from voluntary activities. Disabilities caused by suicide attempts, excessive smoking, excessive drinking, and dangerous sports activities are all covered. In many of these instances, individuals recognize that their activities are likely to

---

[20] *See* note 26, *supra*.

[21] Dr. Hellegers has stated that abortion is medically contraindicated for many individuals with psychiatric problems, and that there is an increased incidence of premature delivery in subsequent pregnancies if the first pregnancy is aborted. *Gilbert* Transcript at 276-277.

[22] Roman Catholic hospitals in the United States (one-third of all private hospitals) will not perform abortions on their premises. A high percentage of Baptist hospitals similarly refuse to allow abortions to be performed in their facilities. Testimony of Dr. Hellegers, *Gilbert* Transcript at 277-278.

[23] Obviously in the case of rape, the sexual intercourse itself is not voluntary. However, the California plan does not provide coverage even under those circumstances.

result in disabling injuries and knowingly accept the risks involved. Yet the State has not claimed that these disabilities are voluntary and thus excluded from coverage.

III. Pregnancy-Related Disabilities Are No More Subject to Planning Than Other Conditions Covered by the California Plan.

Appellant also stresses "that pregnancy is, to a much greater extent than any illness or injury, . . . subject to planning." Appellant suggests that women may therefore go to work for one year solely to collect disability payments after childbirth.[34]

In fact, there are many disabilities covered under the California plan which allow for greater planning than do disabilities related to pregnancy. Elective surgery—e.g., the removal of benign tumors or cosmetic surgery—is, of course, totally subject to planning. Not only is it possible to decide whether to undergo the surgery, but the exact timing of the disabling period can be chosen. Similarly, many non-elective operations are subject to planning, for the timing of the procedure can be quite flexible. Hysterectomies, tonsillectomies, adenoidectomies, and gall bladder operations are among the procedures which can often be scheduled to suit the patient's convenience. It is the fortunate woman, on the other hand, who can succeed in giving birth according to plan precisely one year after she has become employed.

[34] Appellant's Brief at 19-20.

IV. Medical Disagreement Regarding the Duration and Severity of Pregnancy-Related Disabilities Is No Greater Than the Disagreement Regarding Other Disabilities Covered by the California Plan.

A. *Physicians Disagree as to the Duration and Severity of Many Disabilities Included in the California Plan.*

Appellant contends that "doctors disagree sharply on the duration and severity of pregnancy disability" and that this disagreement justifies the exclusion of pregnancy-related disabilities.[35] However, even if some disagreement does exist, doctors also disagree on the duration and severity of many other disabilities which are covered by the California plan. There are, for example, wide differences of opinion on how promptly heart attack victims should return to work. Numerous academic studies criticize the practicing physician for discouraging heart attack victims from returning to the work force promptly.[36] Similarly, the California plan covers mental illness, yet it is well-established that physicians differ sharply

---

[35] Appellant's Brief at 32.

[36] Kaufman and Becker cite "the untrained, unenlightened physician" as a "major" cause of employment disability. *Rehabilitation of the Patient With Myocardial Infarction*, GERIATRICS (August 1955), 355-358. Another study found that:

> "over half of those unemployed need not be out of work. Following myocardial infarction much of the disability experienced by these patients is functional rather than organic and due to the inappropriate medical advice. Misinterpretation of symptoms by the patient and his doctor is a frequent basis for unnecessary inactivity and subsequent failure to return to work." WIGLE, SYMINGTON, LEWIS, CONNELL & PARKER, *Return to Work After Myocardial Infarction*, CANADIAN MEDICAL ASSOCIATION JOURNAL (Feb. 6, 1971), 210, 212.

Nagle, Ganzola and Picton-Robinson in *Factors Influencing Return to Work After Myocardial Infarction*, THE LANCET (Aug. 28, 1971), 454-456, conclude that "essentially the problem seems to be one of education of hospital staff, general practitioners, employers, relatives and the patients themselves."

as to what constitutes mental illness and as to the proper method of treating such illness, including the period of time the patient remains disabled.[37]

Appellant also implies that the disagreements as to the duration of pregnancy-related disabilities are unique because they stem in part from socio-economic considerations such as the relationship between the mother and the new-born infant. However, disagreements as to the duration of other disabilities may stem from socio-economic considerations as well.

For example, in the case of heart attacks, some physicians suggest that given the poor employment prospects of older persons and improved retirement benefits, older heart attack victims should be encouraged to retire rather than try to return to the work force.[38] And, in cases

---

[37] *See* Thomas S. Szasz, *The Right to Health*, 57 GEORGETOWN L.J. 734, 743 (1969), who states that in the area of psychiatry there are "unclarified issues concerning what constitutes an illness and treatment . . . ." He points out that in a leading text book there are listed:

> "40 methods of psychotherapy. Among these . . . [are included] physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs, and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs or electricity, and brain surgery. Obviously, the term 'psychiatric treatment' covers everything that may be done to a person under medical auspices—and more." *Id.*, at 741 [footnotes omitted].

See also Greenwood v. *United States*, 350 U.S. 366, 375 (1956), where the Court said:

> "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . ."

[38] NAUGHTON, BRUHN, LATEGOLA & WHITSELT, *Rehabilitation Following Myocardial Infarction*, AMERICAN JOURNAL OF MEDICINE (May 1969), 725-731. *See also* BIORCK, *The Return to Work of Patients With Myocardial Infarction*, JOURNAL OF CHRONIC DISEASES (1964), 653-57.

involving mental illness, employment prospects and the availability of out-patient care play a crucial role in physicians' determination of the patient's suitability for release from an institution and return to the work force.[39]

Furthermore, the California program now covers disabilities related to "abnormal" pregnancies. Presumably, whatever disagreement there might be among doctors as to the duration of the disability period in these cases is similar to that for the disability period related to a normal pregnancy. In addition, if the complicated pregnancy results in a successful childbirth, broader socio-economic concerns such as infant well-being would be considered in the same way that they would be in the normal pregnancy.

B. *Appellant Has Overstated Physicians' Disagreement As To the Duration and Severity of Pregnancy-Related Disabilities.*

The disagreement among physicians as to the severity and duration of pregnancy-related disabilities is not nearly so great as Appellant would have this Court believe. There is an abundance of evidence which indicates that with respect to normal pregnancy, the medical profession views approximately six weeks as the average period of disability, rather than the fifteen weeks claimed by Appellant.

In the eight affidavits of physicians submitted by Appellant, only one states that in a normal pregnancy the average disabling period would last for fifteen to eighteen weeks.[40] A second physician indicates that following *con-*

---

[39] A study of patients at St. Elizabeth's Hospital in Washington, D.C. found that over half of the patients could be released if appropriate out-patient facilities and residences were available. Many of these patients could then return to the work force. NIMH, *Preliminary Findings From the Psychiatric Inventory of St. Elizabeth's Hospital* (May 1970).

[40] Affidavit of Dr. D. Allan Treat, Appellant's Appendix at 31.

servative medical practice, a woman would be advised to stop working in the third trimester of pregnancy, and therefore perhaps he would agree with an average disabling period of fifteen to eighteen weeks.[41] However, of the remaining six physicians, only one described the average disabling period to be as long as six to eight weeks. The remaining five cited periods of between two to six weeks as average.

In addition, Appellant's Appendix A lists the survey responses of some California obstetricians and gynecologists as to the duration of disabilities caused by normal pregnancies. The estimates ranged from no disability to fifteen weeks.[42] Appellant cited this spread of answers as indicating a lack of medical consensus, which would make norms impossible to develop.[43] However, a more reasonable explanation of the wide range of responses, indicating, for example, that there is no period of disability, is that the physicians did not fully understand the questions asked in the survey and were not aware of the appropriate considerations to be taken into account in making the estimate.[44]

---

[41] Affidavit of Dr. Walter M. Ballard, M.D., Appellant's Appendix at 33.

[42] The average was approximately seven weeks.

[43] Appellant's Brief at 32.

[44] Similarly, the fact that the disability claims for pregnancy submitted since the lower court opinion in this case have averaged approximately fifteen weeks can be explained by physicians' confusion as to the proper elements which comprise a determination of disability for purposes of the California plan. The affidavit of Betty Kathleen Kidder, a former claims examiner for the Disability Insurance Office in San Francisco, suggests that physicians be given pamphlets describing the physicians' role and duty in certifying pregnancy-related disabilities. Moreover, she has explained that the sample indicating the fifteen week average is small, and therefore possibly unrepresentative of the claims which will be received. Appellant's Appendix at 62-64.

In contrast, the experts testifying both for plaintiffs and defendant in *Gilbert* v. *General Electric Co.* agreed that the maximum disability period is approximately six weeks in a normal pregnancy. These physicians, whose attention was focused on the specific considerations involved in insuring pregnancy-related disabilities, stated that in most jobs a woman could continue to work until labor, and that following delivery she would be able to return to work within six weeks.[45] There is every reason to believe that once other physicians are educated as to the meaning of disability in pregnancy for purposes of the California insurance plan, they too will readily conform their certification of disabilities accordingly and consensus will be obtained.

Moreover, the American College of Obstetricians and Gynecologists has stated that "[i]n an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the puerperium. The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks." [46]

Dr. Hellegers has explained that physicians are actually in a better position to determine the physical condition of a woman in puerperium than they are with regard to many other physical conditions. The uterus and its contents are easily subject to medical examination, and imitation of disabling conditions of the uterus is extremely difficult.[47]

As noted earlier, the State suggests that non-physiological considerations also can and should be taken into ac-

---

[45] *See* testimony of Dr. Hellegers, *Gilbert* Transcript at 245-4, 254-5; of Dr. Wilbanks, *Gilbert* Transcript at 624-5, 589-90; and of Dr. Forrest, *Gilbert* Transcript at 23, 65-67.

[46] American College of Obstetricians and Gynecologists, *Policy Statement on Pregnancy-Related Disabilities*, March 2, 1974.

[47] Testimony of Dr. Hellegers, *Gilbert* Transcript at 314.

count in determining the period of disability for pregnancy-related conditions."[48] If this is the State's decision, and physicians are so apprised, it can be expected that the medical community will develop norms which reflect these considerations as well.

In short, Appellant has failed to support its allegation that physicians' determination of the duration and severity of pregnancy-related disabilities is uniquely different from their determination of the length of other disabilities covered by the California plan. In fact, the approach taken by physicians in treating and determining the disabling period associated with pregnancy is comparable in every respect to the approach taken with regard to other insured disabilities. Once again, Appellant has been unable to find a ground for distinguishing pregnancy-related disabilities as a medical matter from the other disabilities which the California plan insures.

---

[48] Appellant's Brief at 32.

CONCLUSION

For the foregoing reasons, as well as for the other reasons set forth in the opinion below, Amici Curiae urge that the judgment below be affirmed.

Respectfully submitted,

JOSEPH N. ONEK
MARCIA D. GREENBERGER
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036

Attorneys for Women's Equity Action League Educational and Legal Defense Fund and Human Rights for Women, Inc.

DATED: March 11, 1974

FILED
MAR 12 1974
[illegible]AK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER WOMEN SIMILARLY SITUATED,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLANT.

MILTON A. SMITH,
General Counsel,

RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

GERARD C. SMETANA,
Suite 6800,
233 South Wacker Drive,
Chicago, Illinois 60684,

LAWRENCE D. EHRLICH,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Quinthorp-Warren Printing Company, Chicago • 346-1717

TABLE OF CONTENTS.

PAGE

Interest of the Amicus Curiae 2

Introduction and Summary of Argument 3

Argument 6

I. The Equal Employment Opportunity Commission's Guideline Relating to Pregnancy and Child-birth Is Entitled to No Weight by This Court 6

A. In General an Agency's Opinions Are Distinct from an Agency's Legislative Rules.. 6

B. An Agency's Opinions Have No Force or Effect of Law and Courts Have Liberty to Determine What Weight to Give to Them When Considering Statutory Issues 8

C. The E. E. O. C.'s Sex Discrimination Guidelines Are an Agency's Opinions and Consequently Do Not Have Effect of Law 9

D. The Agency's 1972 Opinion Declaring That an Employer Must Provide Benefits for Maternity or Pregnancy on the Same Terms As He Provides Benefits for Illness or Injury Is Entitled to No Weight by This Court Because It Is Inconsistent with Prior Opinions, Because It Was Not Issued When Title VII Was Enacted, and Because It Demonstrates None of the Toughtfulness Commonly Associated with Agency Expertise . 11

1. Was the Commission's 1972 Opinion a Contemporaneous Construction of Title VII, and Has It Been Applied Consistently by the Commission for a Long Period of Time 12

2. Was the 1972 Opinion Issued with the Evident Thoughtfulness That Marks Agency Expertise? 16

II. An Employer Need Not Provide Fringe Benefits for Maternity or Conditions Related to Pregnancy on the Same Terms As He Provides These Benefits for Illness or Injury 18

A. Congress Did Not Intend to Require That Employers Provide Fringe Benefits for Pregnancy and Maternity in the Same Manner That These Benefits Are Provided for Illness or Injury 18

B. The Commission Consistently Recognized That an Employer Need Not Treat Pregnancy and Illness Alike When Providing Benefits, and the Court May Rely on These Precedental Guides When, As Here, the Commission Without Persuasive Reason Departs from Its Own Precedent 22

C. An Employer May Exclude Pregnancy, Maternity and Related Conditions from His Benefit Program Without Violating Title VII When the Exclusion Is Related to the Program's Legitimate Objectives 24

1. Maternity Benefits May Be Excluded in Order to Enable the Program to Achieve Legitimate Objectives 24

2. Precedent Supports an Exclusion Which Is Related to the Legitimate Objectives of a Program 25

D. Judicial and Legislative Authorities Support the Position That the Exclusion of Maternity Benefits from Benefit Plans Is Not Illegal Sex Discrimination 29

1. The Decisions of This Court 29

2. Legislative Authorities 31

III. The State Statute Excluding Maternity Benefits from an Insurance Program Does Not Violate the Equal Protection Clause 32

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination 34

B. The Statute Excluding Maternity Benefits from the Benefit Program Does Not Violate the Equal Protection Clause of the Fourteenth Amendment 35

1. The Statute Neither Creates Nor Involves a Suspect Classification 35

2. The Exclusion of Maternity Benefits Does Not Abridge Fundamental Constitutional Rights 37

3. The Statute Denying Maternity Benefits Under the State Benefit Program Does Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Its Constitutionality 38

Conclusion 40

Appendix A1

TABLE OF AUTHORITIES CITED.

Cases.

American Newspaper Publishers Association v. Alexander, 294 F. Supp. 1100, 1103 (DC DC, 1968) 8, 9

Borden's Co. v. Baldwin, 293 U. S. 194 (1934) 25

Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (DC DC, 1972) 30

Clark v. California Employment State Com., 166 C. A. 2d 326 (1958) 24

Cleveland Board of Education v. LaFleur, 6 F. E. P. cases 1253 (1974) 4, 5

Cohen v. Chester Field County School Board, 6 F. E. P. cases 1253 (1974) 4, 5

Dandridge v. Williams, 397 U. S. 471 (1970) 38

Dewey v. Reynolds Metal Co., 402 U. S. 689 (1971), 429 F. 2d 324 (CA 6, 1970) 19

Diaz v. Pan American World Airways, Inc., 442 F. 2d 385 (CA 5, 1971) cert. denied 404 U. S. 950 30

Espinoza v. Farah Manufacturing Co., ... U. S. ..... 38 L. Ed. 2d 287, 6. F. E. P. Cases 933 ..... 9, 11

Espinoza v. Farah Manufacturing Co., S. Ct. Docket No. 72-671, 462 F. 2d 1331 (CA 6, 1972) 4 FEP 931 ..17, 21

Frontiero v. Richardson, 93 S. Ct. 1764 (1973) 34, 35, 36, 38

Gibbson Wine Co., Inc. v. Snyder, 194 F. 2d 329 (CA DC, 1951) 6

Gilbert v. General Electric, Civil Action No. 142-72-R DC ED Va. 14

Goesaert v. Clarie, 335 U. S. 464 (1948) 38

Graham v. Richardson, 403 U. S. 365 (1971) 34, 35

Griggs v. Duke Power Company, 401 U. S. 424 (1971) 16, 17, 26, 27

Jefferson v. Hackney, 406 U. S. 535 (1972) 27

Korematsu v. United States, 323 U. S. 214, 216 (1944) 34, 35

Kotch v. Board of River Port Pilot Commissioners, 330 U. S. 552 (1947) 38

Lindsley v. National Carbonic Gas Co., 220 U. S. 61 .32, 34, 39

McGowan v. Maryland, 366 U. S. 420, 425 (1960) 34

McLaughlin v. Florida, 379 U. S. 184 (1964) 34, 35

Middleton Board of Education, 56 LA 830 (1971) 20

Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 69-70 39

Morey v. Doud, 354 U. S. 457, 472 (1957) 32

N. L. R. B. v. Quality Manufacturing Co., No. 72-1663, decided July 19, 1973 (83 LRRM 2817) petition for writ of certiorari now pending No. 73-765 22

National Lead Co., 18 LA 528 (1952) 20

Newmon v. Delta Air Lines, Inc., 7 F. E. P. Cases 26 (U. S. DC ND Ga., 1973) 16, 17

O'Gorman and Young v. Hartford Insurance Co., 282 U. S. 251 (1930) 25

O'Neil v. United States, 281 F. Supp. 359 (ND Ohio ED, 1968) affirmed 410 F. 2d 288 (CA 6, 1969) 8

Orr v. Trinter, 444 F. 2d 128 (1971) cert. den. 408 U. S. 943 (1972) rehearing denied .... U. S. 38

Phillips v. Martin Marietta Corp., 400 U. S. 542 (1971) 29, 35

Rapid Transit Corp. v. New York, 303 U. S. 573 (1938) 34

In Re: Petition of Chin Thloot Har Wong, 224 F. Supp. 155 (D. C. SDNY, 1963) 11

Reed v. Reed, 404 U. S. 71 (1971) 29, 32
Republic Steel Corp., 37 LA 367 (1961) 20
F. S. Royster Guano Co. v. Virginia, 253 U. S. 421 (1920) 38
San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278 (1973) 34, 37
Shapero v. Thompson, 394 U. S. 618 (1969) 34, 35
Skidmore, et al. v. Swift and Co., 323 U. S. 134 (1944) .. 11
United States Department of Agriculture v. Moreno, 93 S. Ct. 2821 (1973) 38
Wallace v. Debron Corp., 368 F. Supp. 837 (DC Mo., 1973) 27
Weeks v. Southern Bell Telephone and Telegraph Co., 408 F. 2d 228 (CA 5, 1969) 30
Williams v. McNair, 316 F. Supp. 134, 136 (DC DC, 1970) affirmed 401 U. S. 951 33
Williamson v. Lee Optical Co., 348 U. S. 483, 489 (1955) 32
Zuber, et al. v. Allen, et al., 396 U. S. 168 (1969) 8

Statutes.

Equal Rights Amendment 31
Railroad Unemployment Insurance Act of 1946 20
Title VII of the Civil Rights Act of 1964 .....
.....6, 12, 13, 14, 18, 27, 29

Miscellaneous.

Davis, *Administrative Law Text*, Sections 5.03 and 5.11 (1959) 7, 11
Equal Opportunity Commission's Opinion Guideline, effective April 5, 1972, Section 1604.10 .....

CCH, New Developments, Paragraph 8804 E. E. O. C. Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act 15

H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971) 31, 36

Opinion Letter of General Counsel, November 10, 1966.. 13

Opinion Letter of General Counsel, November 15, 1966.. 13

Opinion Letter of General Counsel, December 9, 1966.. 14

Summary of State Labor Laws, U. S. Department of Labor, March, 1969 39

110 Cong. Rec. 2575 (1964) 10

29 C. F. R. Part 1604 (1972) 9

29 C. F. R. Section 1604.2 30

42 U. S. C. Section 2000e-12(b) (1970) 9, 18

42 U. S. C. Sections 2000e-15 (1964) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640.

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER WOMEN SIMILARLY SITUATED,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLANT.

INTEREST OF THE AMICUS CURIAE.[1]

The statement of interest has been submitted previously in the Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Jurisdictional Statement.

1. Consents of all parties to the participation of the amicus in this proceeding have been filed with this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT.

This case presents the issue of whether a state statute may exclude maternity benefits from a state insurance program, which is intended to provide broad coverage at a minimal cost, without violating the Equal Protection Clause of the Fourteenth Amendment. This issue, however, can be viewed more broadly and when so considered this case has national and far reaching significance. Thus, while the constitutional question is significant, even more compelling are closely related questions concerning the Equal Opportunity Commission's new opinion guideline, effective April 5, 1972, on pregnancy and childbirth. This guideline states in part: "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." (Section 1604.10 (effective April 5, 1972))

Furthermore, a discussion of the Commission's guidelines is appropriate in this case because of the reflective effect of these guidelines on the Fourteenth Amendment. That is, this Court's decision here may well be influenced by the guidelines; conversely, this Court's decision here may have a significant impact on the determination of related cases arising under Title VII.

Two issues of national importance are occasioned by this guideline:

1. Should this Court give any weight to the Commission's opinion or guideline on pregnancy and childbirth?

2. Should an employer be required to provide fringe benefits for pregnancy or maternity on the same terms as he provides these benefits for illness or injury?

It is apparent that the question of whether an employer covered by Title VII may exclude maternity and related conditions from his insurance program will be a question that will

frequently trouble every employer who provides insurance coverage for his employees, and, in addition, will puzzle lower courts unless this Court provides guidance.

While this Court has rendered decisions in the *LaFleur* and *Cohen*[2] cases, there is a significant difference between those cases and the instant case. *LaFleur* and *Cohen* involved the narrow issue of whether school boards' policies requiring mandatory maternity leave in the fourth or fifth month of pregnancy violated the Fourteenth Amendment. That is, the issue was whether there was a rational basis for an employer to treat all pregnant employees alike without considering an individual's ability to work despite pregnancy. Here, this Court is asked to consider whether an employer may exclude maternity and related conditions from coverage under his employee benefit program without being guilty of sex discrimination simply because the excluded condition occurs only to one sex. To focus more closely on this question, it is apparent that an employer implementing his benefit insurance program may, if he chooses, exclude a condition, such as heart disease, which affects both men and women without violating any law. Does an employer, then, by excluding maternity and related conditions as covered risks under his benefit program thereby violate Title VII whether or not he presents sound reasons to justify the exclusions? The E. E. O. C. says yes. Reason dictates the contrary. This Court has not spoken.

The *amicus* believes that an employer should be able to formulate reasonable rules to promote the objectives of his insurance program. These objectives are to provide broad coverage and maximum benefits at a minimal expense. Based upon experience and information, for example,[3] an employer may believe that the inclusion of maternity and related conditions as covered risks will result in excessive demands upon his fund and therefore will require either an increase in premiums for all employees or a

2. 6 F. E. P. Cases 1253 (1974).

3. The examples given here and elsewhere are intended to be illustrative only and are not intended to be all inclusive or to exclude other examples.

reduction in benefits to all employees. In those circumstances, the employer should be able to exclude maternity and related conditions as covered risks without being guilty of sex discrimination. This exclusion is consistent with the legitimate objectives of the disability program. Yet the E. E. O. C. by a brand new opinion guideline effective in 1972 says that the very exclusion of maternity benefits from benefit programs, without more, violates Title VII and the Appellee here urges that such an exclusion *per se* violates Amendment Fourteen.

This Court has not passed upon the constitutional issue or the more important and related issues concerning the E. E. O. C.'s guideline and *LaFleur* and *Cohen* do not reach these questions.

The *amicus* believes that this case provides an ideal vehicle for this Court to provide guidance to employers who come within the provisions of Title VII of the Civil Rights Act and either exclude maternity as a covered risk under insurance programs, or do not provide benefits for this condition on the same terms as they provide benefits for illness or injury. These issues presented here are of national scope and involve countless employers.

The *amicus* will first discuss the weight that should be given by courts to administrative guidelines, with particular emphasis on the weight that should be accorded to the E. E. O. C.'s 1972 guideline concerning pregnancy and childbirth. The *amicus* will then consider whether Title VII requires an employer to provide fringe benefits for maternity on the same terms as he provides these benefits for illness or injury. Finally, the *amicus* will discuss the constitutionality of the statute involved in this case.

ARGUMENT.

I.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S GUIDELINE RELATING TO PREGNANCY AND CHILD-BIRTH IS ENTITLED TO NO WEIGHT BY THIS COURT.

It is the position of the *amicus* that the Commission's Sex Discrimination Guidelines are merely current opinions of the Commissioner as to the meaning of Title VII[4] and that, therefore, these guidelines do not have the force of law. Consequently, this Court has complete liberty to decide whether or not it will accord weight to the Commission's opinions, and if so, how much. In this proceeding, the *amicus* believes that this Court should give no weight whatever to the Commission's opinion that fringe benefits should be provided for pregnancy and maternity on the same terms as these benefits are provided for illness or injury.[5]

A. In General an Agency's Opinions Are Distinct from an Agency's Legislative Rules.

At the outset, however, it is well to distinguish between an agency's opinions or interpretative rulings on one hand and its legislative rules on the other. This distinction is background necessary to fully appreciate the *amicus'* position that the Commission's guidelines are but the Commissioner's *current opinions.*

A well reasoned judicial treatment of the distinction between agency opinions or what the court calls "interpretative rulings" and legislative regulations is found in *Gibbson Wine Co., Inc.* v. *Snyder,* 194 F. 2d 329 (CADC, 1951) at 333. The court stated:

4. Title VII of the Civil Rights Act of 1964, Sections 701-16, 42 U. S. C. Sections 2000e to 2000e-15 (1964).

5. Section 1604.10 (effective April 5, 1972.)

"The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative Officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implentary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means."

Professor Davis in his treatise on administrative law highlights this distinction:

"The distinction between interpretative rules and legislative rules is an essential part of our system, even though the Supreme Court has never provided a full-bodied discussion of it. A legislative rule is the product of an exercise of legislative power by an agency, pursuant to a grant (whether explicit or not) of legislative power by the legislative body; a court will no more substitute judgment on the content of a valid legislative rule than it will substitute judgment on the content of a valid statute. A legislative rule is valid if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.

"Interpretative rules are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law. Interpretative rules usually interpret the statute, but sometimes they properly go beyond the statute, and when they do they are still called interpretative rules even though they are not interpretative in the literal sense."[6]

This distinction between an agency's opinions and its legislative rules is significant because as we will see "courts often substitute judgment as to the contents of an interpretative rule but almost always . . . refrain from substituting judgment as to the content of a legislative rule."[7]

---

6. Davis, *Administrative Law Text*, Section 5.11 (1959).

7. *Id.* at Section 5.03.

B. An Agency's Opinions Have No Force or Effect of Law and Courts Have Liberty to Determine What Weight to Give to Them When Considering Statutory Issues.

This Court in *Zuber et al.* v. *Allen et al.*, 396 U. S. 168 (1969), discussed the weight given to administrative opinions and stated that while contemporaneous opinions are entitled to weight they are "only one input in the interpretational equation. . . . The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress." (at 192-193)

The lower courts have fully agreed with *Zuber*. A particularly instructive case that discusses what judicial deference is given to administrative opinions is *O'Neil* v. *United States*, 281 F. Supp. 359 (ND Ohio ED 1968) affirmed 410 F. 2d 888 (CA 6, 1969). In that case the court observed that all regulations are not entitled to equal weight before the courts.

> "A court has greater freedom when passing on an interpretative rule than a legislative one. In the case of an interpretative rule, the legislature has not delegated power to an agency to make a rule which is binding upon the courts. An interpretative regulation does not prevent a reviewing court from substituting its judgment on questions of desirability or wisdom. 'The law is embodied in the statute and the court is free to interpret the statute as it sees fit.' "

The Court in *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1101, 1103 (DC DC 1968) bluntly stated that an interpretative rule is ". . . not a regulation having the force or effect of law."

We have now seen generally the distinction between administrative opinions and legislative rules and also that it is important for courts to make this distinction in order to define the extent of their powers to interpret statutes when confronted with administrative regulations. When confronted with agency

opinions a court may substitute its judgment for the agency's and reach a different conclusion than did the agency on the same facts.

C. The E. E. O. C.'s Sex Discrimination Guidelines Are an Agency's Opinions and Consequently Do Not Have Effect of Law.

It is apparent that the E. E. O. C. guidelines are not legislative rules as the courts and commentators have defined that term, but are merely expressions of current opinions by the administrative officers as to the meaning of the statute. Therefore, these guidelines do not have the force of a law binding upon a court, and a court is at liberty, when confronted with an issue relating to Title VII, to substitute its judgment on "questions of desirability and wisdom" and to reach a different result than did the Commissioner when he considered the same issue. The interpretive nature of the guidelines is seen from the guidelines themselves:

> "Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U. S. C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 29 C. F. R. Part 1604 (1972).[8]

This Court and lower courts have recognized that the E. E. O. C.'s guidelines are opinions and consistent with judicial decisions regarding administrative opinions generally have held *that these guidelines do not have "the force or effect of law." American Newspaper Publishers Association* v. *Alexander, supra* at 1103, (emphasis supplied). *Espinoza* v. *Farah Manufacturing Co.*, ____ U. S. ____, 38 L. Ed. 2d 287, 6 F. E. P. Cases 933.

Indeed there is reason that this Court should not defer to any extent to the E. E. O. C.'s guidelines. On March 24,

8. These guidelines are based on 42 U. S. C. Section 2000e-12(b) (1970) which suggests that such opinions may be issued by the Commission.

1972 Congress invested the Commission with prosecutorial powers. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law. The relevant legislative history leaves room for no reasonable doubt, since in Section 713(a) of Title VII (42 U. S. C. 2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations.[9]

The Commission was rather required to prosecute its cases in a federal district court, and it is this court that is to interpret the Civil Rights Act and apply that law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to create a body of substantive labor law. Within the statutory framework of the National Labor Relations Act, the General Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[10] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor considers illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The Commission's opinions are just that—its view of what constitutes illegal conduct and a court should treat them as nothing else. The Commission, like the Justice Department, has been accorded only prosecutorial functions and like the Justice Department cannot fashion the law it elects to present. This is the fundamental distinction between agencies given only prosecutorial roles and those, such as the National Labor Relations Board, to which Congress has given

9. 110 Cong. Rec. 2575 (1964).

10. The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

adjudicative and regulatory functions as well as prosecutorial duties. When dealing with a Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

D. The Agency's 1972 Opinion Declaring That an Employer Must Provide Benefits for Maternity or Pregnancy on the Same Terms As He Provides Benefits for Illness or Injury Is Entitled to No Weight by This Court Because It Is Inconsistent with Prior Opinions, Because It Was Not Issued When Title VII Was Enacted, and Because It Demonstrates None of the Thoughtfulness Commonly Associated with Agency Expertise.

While we have seen that E. E. O. C. guidelines do not have a force of law, and that a court need not defer to them when considering a Title VII issue, the crucial question here is what, if any, weight should this Court give to the Commission's opinion that "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[11]

The amicus contends for reasons expressed in subpart C that this Court should give no weight to this guideline. There are in addition other important reasons why no weight should be accorded to this guideline.

Courts confronted with similar questions involving opinions of other agencies, have applied a variety of factors[12] in evaluating the weight to give to these opinions. Accordingly, guided by these factors, we shall examine the Commission's 1972 opinion.

---

11. Section 1604.10 (effective April 5, 1972).

12. *Espinoza* v. *Farah Manufacturing Co., supra; Skidmore, et al. v. Swift and Co.*, 323 U. S. 134 (1944); *In Re: Petition of Chin Thloot Har Wong*, 224 F. Supp. 155 (D. C. SDNY, 1963) at 165; Davis, *Administrative Law Text*, Section 5.03 (1959).

The factors that are commonly recognized by courts when they evaluate the weight to give administrative opinions are:

First, was the opinion a contemporaneous construction of the statute it purports to interpret?

Second, has the opinion been applied consistently by the agency over a long period of time?

Third, was the opinion issued with evident thoughtfulness?

Fourth, has the agency demonstrated expertise in dealing with the subject discussed by the opinion?

When these factors separately or in confederation are applied to the Commission's 1972 opinion concerning pregnancy and maternity benefits, it will be clear that this opinion is entitled to no weight by courts when they decide Title VII issues.

1. Was the Commission's 1972 Opinion a Contemporaneous Construction of Title VII, and Has It Been Applied Consistently by the Commission for a Long Period of Time.

The short answer to both parts of this question is "no." However, a brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[13] and 1969 the Commission issued a number of opinions, announcing how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

---

13. Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

For example, in an opinion letter, dated November 10, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

"In a recent opinion letter regarding pregnancy we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."

Five days later, the General Counsel said:

"Gentlemen:

You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay;* although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. *On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.*

Sincerely yours,

CHARLES T. DUNCAN
General Counsel"

(November 15, 1966)
(emphasis supplied)

A month later, he said,

> "You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> "In a recent opinion letter regarding pregnancy, we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expenses for the delivery of employees' children, *but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.*" (December 9, 1966, as reported in CCH Employment Practices, 12-21-66, paragraph 17, 334-44) (emphasis supplied)[14]

Within sixteen months after the enactment of Title VII, then, the Commission repeatedly advised employers that they need not "provide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission still demonstrating consistency maintained this position through 1969. On June 19, 1969, a representative

---

14. The record in *Gilbert* v. *General Electric Company*, Civil Action No. 142-72-R, DCED Va. reveals: (1) that the Commission discussed this policy and various alternatives before issuing this and other opinion letters, (pages 566-567); (2) the term "fringe benefits" as interpreted by the Commission included wage continuation, sick pay, hospitalization and any other benefit applied in the case of absence due to illness (page 563); (3) the commission's policy as expressed in these opinion letters applied whether the benefit program was financed on a contributory basis or solely by the employer. (page 564). This portion of the record is reproduced in Appendix A attached hereto.

of the Commission announced that the Commission "views pregnancy as a temporary disability, and has not to date equated it with sickness."

The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[15]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then, for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy.[16] The 1972 opinion, of course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject and because it is totally and remarkably inconsistent with prior opinions issued over the last several years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII. What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contem-

15. CCH, *New Developments, Paragraph* 8804 E. E. O. C. Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

16. Whether expressed in a guideline, letter or reported investigation of a specific charge, the Commission's statements and views are merely its *opinions* concerning *inter alia* whether particular conduct violates Title VII. Any so called "E. E. O. C. decisions" which may concern the subject in question are not, therefore, decisions at all, but are merely reported investigations following a charge, and the report contains the investigators' or prosecutors' opinion that "reasonable cause" does or does not exist to believe Title VII has been violated. Moreover, the so called "decisions" have even less value than the guidelines. While a guideline is the expression of a current opinion by the administrator on the meaning of the statute, a reported investigation states merely that based on the *facts then present* in that case there is or is not *reasonable cause* to believe that the Act has been violated. Arguments or reasons advanced as the case progresses can alter that opinion and it is of little guidance unless a subsequent case is factually "on all fours." Thus, while the arguments in this brief are directed primarily against the Commission's 1972 guideline opinion, these arguments, here and elsewhere, may apply equally to any investigation reports that may represent a change in direction by the Commission.

poraneous construction, the answer is, "none." Moreover, the answer does not change when the remaining relevant criteria are applied.

2. Was the 1972 Opinion Issued with the Evident Thoughtfulness That Marks Agency Expertise?

There is no evidence that the new 1972 opinion was formulated with consideration for alternatives or concern for ramifications. Moreover, when the Commission, after several years of consistently applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy, or by new facts not previously in existence.[17] Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideration. The Commission has offered no such proof here.[18] Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then is now clear. In determining whether to defer or not and in evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 opinion concerning fringe benefits and maternity or pregnancy is viewed in light of these factors, it is clear that this opinion is entitled to neither weight nor deference.

After promulgating the challenged guideline the Commission apparently hoped to gain quick judicial approval under the authority of *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971). However, *Griggs is distinguishable* and indeed, supports the view that the guideline in question here is entitled to no weight. For one thing when *Griggs* was decided the Commission did not have prosecutorial powers. For another,

17. *Newmon* v. *Delta Air Lines, Inc.*, 7 F. E. P. Cases 26 (USDC ND Ga., 1973). There, the court held that the denial of employment benefits to employees on maternity leave did not violate Title VII.

18. *Newmon* v. *Delta Air Lines, Inc., supra.*

the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[19] must not be overvalued, but rather should be confined to the facts of that case. As the Sixth Circuit in *Espinoza* v. *Farah Manufacturing Co., supra* observed:

> "In *Griggs*, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U. S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that 'the conclusion is inescapable that the E. E. O. C.'s construction . . . comports with Congressional intent.' 401 U. S. at 436"[20]

Here, unlike *Griggs*, as will be demonstrated *infra* in part II, A there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.[21]

---

19. at 433-434.

20. *Espinoza* v. *Farah Manufacturing Co.*, 462 F. 2d 1331 (CA 6, 1972).

21. There was little or no legislative history on sex discrimination. *Newmon* v. *Delta Air Lines, Inc., supra.*

II.

AN EMPLOYER NEED NOT PROVIDE FRINGE BENEFITS FOR MATERNITY OR CONDITIONS RELATED TO PREGNANCY ON THE SAME TERMS AS HE PROVIDES THESE BENEFITS FOR ILLNESS OR INJURY.

A. Congress Did Not Intend to Require That Employers Provide Fringe Benefits for Pregnancy and Maternity in the Same Manner That These Benefits Are Provided for Illness or Injury.

In considering Congressional purpose or intent here, it is well to begin by examining the function of the E. E. O. C. and its approach to fringe benefits and maternity. The E. E. O. C. is the agency charged by Congress with the administration, interpretation and enforcement of Title VII of the 1964 Civil Rights Act. It can logically be presumed, therefore, that Congress was well informed as to the interpretations its Commission was applying to Title VII, particularly during early stages of the Commission's existence. Because the Commission consistently and explicitly stated for *several years* since the enactment of Title VII that employers were not required to provide the same fringe benefits for pregnancy as they provide for illness or to treat these distinct conditions in the same manner, Congressional awareness of this interpretation can be legally presumed.[22] Despite being aware that the Commission did not seek to compare an employer's treatment of pregnancy with his treatment of illness or injury, Congress did nothing to override the Commission's interpretation and its consequent application of that part of Title VII. Congress did not by statutory amend-

22. Congress has expressly provided that an employer's reliance on the Commission's interpretative opinions is a valid and complete defense in an E. E. O. C. proceeding. Erroneous interpretations if raised as valid defenses to E. E. O. C. proceedings could seriously frustrate the effective implementation of the Act. Thus, it is readily apparent that Congress intended to be kept informed of the Commission's interpretations. (42 U. S. C. 2000e-12b (1970).)

ment, or otherwise seek to amend or to modify the Commission's interpretation.

Had Congress intended to require an employer to treat pregnancy and illness alike when devising or applying a personnel maternity policy, it had ample opportunity to manifest this intent in 1972 when it enacted a number of amendments to the Civil Rights Act of 1964. In a parallel situation involving religion, Congress required an employer to accommodate his work schedules and employment policies to the individual religious practices of his employees. This occurred when Congress reacted to the Fifth Circuit's decision in *Dewey* v. *Reynolds Metal Co.*[23] There, the court was faced with a Commission guideline that required an employer accommodate his business requirements to the religious beliefs of his individual employees or be held in violation of Title VII. Pursuant to this guideline, an employee, Dewey, charged that his employer discharged him for refusing, because of his religious beliefs, to arrange for a replacement to perform Sunday overtime work. The court held;

> "The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. . . .
>
> Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the E. E. O. C. regulations which in our judgment are not consistent with the Act." at 334

In effect the court recognized that while the Act prohibited an employer from constructing his hiring, promotion or discharge policies so as to discriminate because of religion, the Act did not require an employer to adjust his personnel policies to accommodate the religious practices—such as the manner

23. 402 U. S. 689 (1971), 429 F. 2d 324 (CA 6, 1970).

of Sabbath worship—of his individual employees. Congress recognized that the court's interpretation was accurate because it reacted by amending the Act in 1972 to require employers to adjust their work schedules and personnel policies to accommodate the various religious practices of their employees.

Because religion and sex are referred to in the 1964 Act in a like manner, it is reasonable to assume that Congress intended the Employer's obligations in the area of sex discrimination to be similar to those in the area of religious discrimination. By the 1964 Act Congress intended neither that an employer accommodate his personnel policies to individual religious practices nor that an employer pay maternity benefits in the same manner as he provides benefits for illness or injury. However though Congress in 1972 amended the 1964 Act to specifically enlarge an employer's responsibility in the area of religious discrimination, Congress did not enact an amendment requiring an employer to treat pregnancy and illness alike and to provide benefits for pregnancy on the same terms as he provides benefits for illness. This Congressional silence is even more revealing when the following facts are considered:

1. Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect "to a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health."

2. Congress had access to arbitrators' decisions which for two decades equated pregnancy and illness and required an employer to apply the same benefit policies to both.[24] Yet

---

24. *Middleton Board of Education*, 56 LA 830 (1971); *National Lead Co.*, 18 LA 528 (1952); *Republic Steel Corp.*, 37 LA 367 (1961).

despite these decisions Congress chose not to require that employers treat pregnancy and illness alike in fringe benefit programs.

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. It enacted an amendment in the area of religious discrimination, and the Railroad Unemployment Insurance Act specifically treats maternity as a form of illness. Congressional silence, then, must be taken to mean that Congress has no intention in 1972 to require an employer, when devising or implementing his employment policy, to equate pregnancy and illness and to treat these distinct conditions in the same manner with respect to fringe benefits, or related matters.

The significance of Congressional intent is highlighted by this Court's recent decision in *Espinoza* v. *Farah, supra.* There, this Court refused to equate discrimination based on citizenship with the statutorily proscribed discrimination based on national origin, since such an equation would contravene Congressional intent. It follows that this Court should not require an employer to treat the distinct conditions of pregnancy and illness alike when constructing a benefit program since such a requirement would be contrary to Congressional intent.[25]

---

25. In reaching its decision in *Espinoza*, this Court refused to defer to an E. E. O. C. guideline when the application of this guideline would be inconsistent with the intent of Congress and with the Commission's views as previously expressed in opinion letters. Therefore, in the instant case, the guideline in question should be given no effect by this Court not only for the reasons advanced in part I, D, *supra*, but also because the guideline is contrary to Congressional intent.

B. The Commission Consistently Recognized That an Employer Need Not Treat Pregnancy and Illness Alike When Providing Benefits, and the Court May Rely on These Precedental Guides When, As Here, the Commission Without Persuasive Reason Departs from Its Own Precedent.

After years of consistently saying that employers need not treat pregnancy and illness alike,[26] the Commission, in a dramatic shift, equates pregnancy and illness for benefit policy purposes. What evidence was offered by the Commission to justify its turn about? The Commission did not hold public hearings or invite public debate. It did not suggest that it suddenly devined a heretofore unnoticed Congressional intent. It did not claim to have discovered the law. It simply pronounced its guideline and will seek to win for it judicial approval so that its newest opinion can be raised to the level of judicial fiat.

The *amicus* believes that the Commission's departure from its own precedent can be justified, if at all, only if the Commission proves by persuasive evidence that this radical shift was caused by very good reasons, *e.g.*, a newly announced Congressional purpose directly relating to the Commission's new theory or by facts that did not exist when the Commission pronounced its earlier opinions. Because the Commission at no time has demonstrated that such reasons exist, its departure from its own precedent should not be countenanced by this Court, particularly when the Commission's new opinion will cause substantial changes in employer-employee relations including major revisions in employer benefit programs.

Strong support for the *amicus'* position is found in the Fourth Circuit's opinion of *N. L. R. B.* v. *Quality Manufacturing Co.*[27] and the *amicus* offers that court's well reasoned opinion here as a guide.

---

26. See Section I, part D, *supra.*

27. 481 F. 2d 1018 (CA 4, 1973); Petition for Writ of Certiorari now pending No. 73-765.

In *Quality*, the National Labor Relations Board purporting to interpret the Labor Act held for the first time in its history that an employer violated that Act by discharging an employee who insisted upon union representation at a meeting called by the employer to investigate the employee's conduct. The Court rejected the Board's holding because it "departed from existing case law[,]" and because,

> ". . . never has it been thought, as the Board would hold here, that [statutory] rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment or even his working conditions.' "

The Court observed that the Board did not justify or support its "new theory" by a persuasive analysis of the Labor Act or of legislative history, and concluded that the Board has no power to "alter or rearrange employer-employee relations to suit its very whim." The parallel between *Quality* and this case is clear. Both in *Quality* and in this case, an agency claiming to interpret its statute departed from its own precedent without advancing persuasive reasons for doing so. In both *Quality* and in this case, the new agency opinion will have considerable impact on employer-employee relations. As did the court in *Quality* this Court should also reject an agency's departure from its own precedents when the agency advances no cogent reasons to justify its shift.

Rather than sanctioning and deferring to this abrupt departure from precedent, this Court, consistent with Congressional intent, should permit employers to treat maternity and sickness or injury differently when planning and implementing fringe benefit programs, particularly when the employer advances cogent business reasons to justify this difference in treatment.

C. An Employer May Exclude Pregnancy, Maternity and Related Conditions from His Benefit Program Without Violating Title VII When the Exclusion Is Related to the Program's Legitimate Objectives.

1. Maternity Benefits May Be Excluded in Order to Enable the Program to Achieve Legitimate Objectives.

While it is true that pregnancy and maternity are unique to females, it does not follow that an employer violates Title VII when he excludes those conditions or related conditions as covered risks under his benefit or disability programs. The objective of these programs is to provide the broadest coverage and maximum benefits for as little cost to the employer or employees as possible. An employer without violating any law should be able to formulate rules to promote this objective. Based on study or information, an employer may determine that the inclusion of a disease, such as heart disease, which happens to affect both sexes, will result in excessive demands upon his fund and therefore will require either an increase in contributions by all participants or a reduction in benefits to all participants. Under those circumstances, it is clear that the employer is able to simply exclude heart disease as a covered risk without violating any law. Similarly, based on experience, study or information, for example, an employer may determine that the inclusion of maternity or related conditions will result in excessive demands on his fund or require increased contributions or reduced benefits.[28] Under these circumstances, an employer should be able to exclude maternity and related conditions as covered risks without being guilty of sex discrimination even though the excluded conditions affect only one sex. His decision to ex-

28. The Supreme Court of the State of California stated in *Clark v. California Employment State Com.*, 166 C. A. 2d 326 (1958) that it is "common knowledge" that a condition "arising from pregnancy is classified and excluded from coverage provided by private contracts of health and accident insurance in order to effect a premium rate lower than is required in the absence of such exclusion." at pp. 331 and 332.

clude maternity and related conditions is fully consistent with his desire to protect the fiscal integrity of his benefit program and to provide maximum benefits to all employees at the lowerest cost. The employer should not, in such circumstances, be found to have violated Title VII.

2. Precedent Supports an Exclusion Which Is Related to the Legitimate Objectives of a Program.

Though maternity benefits are excluded in order to enable the benefit or insurance program to retain fiscal integrity and to provide maximum benefits at the lowest cost, it is settled that exclusions or limitations based upon economic considerations are valid and legitimate. *O'Gorman and Young* v. *Hartford Insurance Co.*, 282 U. S. 251 (1930); *Borden's Co.* v. *Baldwin*, 293 U. S. 194 (1934). In *O'Gorman*, a New Jersey statute regulated and limited the amount of commission that could be paid to fire insurance agents. This Court found that it was reasonable to conclude that a high commission cost to an insurance company may result in high insurance premiums for customers or in impairment of the financial stability of the insurance company, thereby defeating the objectives of fire insurance programs to provide reliable coverage at reasonable rates. Here, it can be reasonably said that the high cost of pregnancy benefits may result, for example, in increased employee contributions to the employer's benefit program or in impairment of the financial stability of that program thereby defeating the program's objective to provide maximum coverage at reasonable rates. This Court permitted the State to limit commissions in order to further the obectives of the insurance programs. This Court, by analogy, should permit employers to limit or eliminate the cost of pregnancy benefits in order to further the objectives of their benefit plans.

Similarly, if the cost of prostate operations increased, an employer would be able to exclude this operation as a covered risk, if in his judgment inclusion would defeat the goal of his

benefit program, without being guilty of unlawful sex discrimination. It is overly simplistic to conclude that by excluding a condition occurring to only one sex from his benefit program an employer *without more* unlawfully discriminates against that sex. Such a conclusion overlooks the rational practical judgments that an employer must make if he is to maintain the objectives of his program and automatically equates an employers' attempt to construct a comprehensive benefit program at a minimal cost to purposeful discrimination against a group or a class.

Not only does precedent support the validity of exclusions based upon economic considerations, but also authorities deciding issues arising under Titles VI and VII are in accord with the *amicus'* position.

On analysis, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), while frequently cited by plaintiffs in Title VII proceedings, is in accord with the positions herein asserted. There, the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Blacks at a substantially higher rate than white applicants. Because these requirements were not shown to be related to successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Blacks. This Court stated that, "If an employer practice which operates to exclude Blacks cannot be shown to be related to job performance, the practice is prohibited." p. 431.

While this Court in *Griggs* found that the requirements *were unrelated to measuring job performance, and, therefore, discriminatory,* this Court stated that nothing in the Act prevents an employer from using tests which relate to job performance and employers may require applicants to be fit for the job.

In *Jefferson* v. *Hackney*,[29] this Court amplified and interpreted this aspect of *Griggs*. This *Court* stated, at 549:

> "We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages *is rationally related* to the purpose of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job related, and *for that reason were impermissible under the specific language of Title VII of the Civil Rights Act*. Since the Texas procedure challenged here is related to the purposes of the welfare program, it *is not* proscribed by Title VI simply because of the variances in the racial composition of different categorical programs." (Emphasis supplied)

In both *Griggs* and *Jefferson* the challenged procedures had racially discriminatory effects. The job testing procedure in *Griggs* violated Title VII because it was not related to job performance. In *Jefferson* the differences in benefit payments did not violate Title VI because it could be reasonably said that these differences in payment were related to the legitimate purposes of the welfare program.

---

29. 406 U. S. 535 (1972). *Jefferson* involved a state's determination to allocate a fixed pool of welfare money by paying AFDC benefits at 75% of need while paying other insurance programs at a higher percentage, e.g., old age assistance at 100% of need and aid to blind at 95% of need. AFDC recipients challenged this determination by alleging racial discrimination, since the proportion of AFDC recipients who were black or Mexican-American was higher than the proportion of aged, blind or disabled welfare recipients who fell within these minority groups. This Court found no invidious discrimination under the Fourteenth Amendment and said racial discrimination was not proven. This Court did not substitute its judgment for the State's determination on how to best allocate the welfare money, even though different policy judgments were possible, because the State's conclusion that the aged and infirm were less able to bear the hardships of an inadequate living standard than were the young AFDC recipients was reasonable.

In accord is *Wallace* v. *Debron Corp.*, 368 F. Supp. 837 (DC Mo., 1973) 6 F. E. P. Case 316.

In accord with *Jefferson* and *Griggs*, then, where there is a reasonable basis to conclude that the exclusion of maternity fringe benefits from employer benefit or insurance programs is related to the furtherance of the programs' objectives, the exclusion does not violate Title VII.

Moreover, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina County employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Therefore, in *Griggs*, this Court employed a stringent business necessity test. Here, the exclusion from benefit programs of maternity benefits adversely affects only a portion of one sex some of the time while at the same time having a salutary effect on members of that sex generally as well as on all other employees. The exclusion here is the result of a conscious choice to afford other benefits to both women and men which would be otherwise unavailable. It must be kept in mind that when an employer has only a finite amount of money to expend on coverage for employees of both sexes, he must be accorded the right to determine how to utilize those funds most effectively for the benefit of all. Exclusions based solely on the variables of cost and comprehensiveness of coverage cannot rationally and automatically be attributed to any prohibited sex discrimination. For these reasons, the strict test utilized in *Griggs* cannot be applied here. Rather, where there is a *reasonable basis* to exclude maternity benefits from benefit or insurance programs, the exclusion cannot violate Title VII.[30]

30. In addition, while Griggs involved discrimination between different races, in the area of maternity fringe benefits there is no such comparable competition between sexes and a policy excluding maternity benefits does not, therefore, constitute illegal sex discrimination any more than the hiring of one Black rather than another would constitute illegal racial discrimination.

D. Judicial and Legislative Authorities Support the Position That the Exclusion of Maternity from Benefit Plans Is Not Illegal Sex Discrimination.

1. The Decision of This Court.

The desideratum of the policy underpinning the proscription against sex discrimination is to assure that all persons who are similarly circumstanced are treated alike regardless of their sex. Consequently, constitutionally or statutorily prohibited sex discrimination exists only when men and women who are otherwise similarly situated or in potential or actual competition are treated unequally solely because of sex rather than because of individual capabilities. As this Court has recognized:

> "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children." [31]

An analysis of *Martin Marietta* and those other cases cited in footnote 31 yields the view that there can be no statutorily

---

31. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971). This Court has reaffirmed this principle in *Frontiero* v. *Richards*, 93 S. Ct. 1764 (1973) and in *Reed* v. *Reed*, 404 U. S. 71 (1971); these cases arose under the Fourteenth Amendment. In *Frontiero*, a statute mandated "dissimilar treatment for men and women who are . . . similarly situated"; it provided that a service woman could not claim her husband as a dependent in order to obtain increased benefits unless he was, in fact, dependent upon her for over one-half of his support. In contrast a service man could claim his wife as a dependent without regard to whether or not she was dependent upon him for any of her support. Since both service men and women were otherwise equally qualified for dependent benefits, this Court held that the statute's disfavorable treatment of service women when compared with the treatment accorded to service men was based solely upon the considerations of sex. Consequently, the statute contravened the Fourteenth Amendment. Similarly, in *Reed* unconstitutional sex discrimination existed because a state's statute gave preference to the male when both a male and a female otherwise equally entitled applied to administer a decedent's estate.

or constitutionally proscribed sex discrimination in areas where the sexes are not similarly situated or in actual or potential competition. That is, only when a regulation may apply to both sexes will unequal treatment based soley upon sex violate the Fourteenth Amendment or Title VII. Since pregnancy is unique to women, reasonable regulations concerning benefits relating to pregnancy and maternity affect only women; thus, these regulations do not affect women in an area where they are similarly situated with men. Consequently, deprivation of maternity benefits does not constitute the proscribed dissimilar treatment for men and women who are similarly circumstanced, and reasonable maternity regulations denying pregnancy and maternity benefits do not constitute prohibited sex discrimination and do not violate Title VII.

Moreover, judicial opinions that have struck down discriminations based upon sex have been dealing with outmoded stereotypes based upon supposed differences between the sexes where those stereotypes produce distinct employment disadvantages for one sex.[32]

Consistent with the reasoning in these opinions, the real purpose of the sex discrimination law is to outlaw discrimination based upon outmoded sex stereotypes such as those mentioned in the administrative guidelines, including the characterizations that women are not capable of aggressive salesmanship or that men are less able to assemble intricate equipment.[33]

Unlike the so-called protective legislation that denied women jobs in favor of men, an employer's maternity regulation concerning benefits provided in the case of pregnancy does not operate in an area where men and women compete and does not create or perpetuate outmoded sex stereotypes. Accordingly,

32. *E.g. Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (CA 5, 1969); *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA 5, 1971) *cert. denied.* 404 U. S. 950; and *cf. Boyce* v. *Safeway Stores, Inc.*, 351 F. Supp. 402 (DC DC, 1972).

33. 29 C. F. R., Section 1604.2.

there can be no sex discrimination when these regulations are implemented even if pursuant to these regulations the employer treats pregnant employees differently than other employees.

2. Legislative Authorities.

The legislative history of the proposed Equal Rights Amendment[34] is consistent with the view expressed in the foregoing section concerning the construction of the term "sex discrimination." Thus, fourteen members of the House Committee on the Judiciary expressed the following as their separate views on the version of the Equal Rights Amendment ultimately approved by Congress:

> "The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness'. As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." [35]

It follows that if a physical characteristic such as the capability to bear children is unique to one sex, the proposed Equal

---

34. The proposed amendment provides:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 3. This Amendment shall take effect two years after the date of ratification.

35. H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

Rights Amendment does not prohibit legislation which regulates or applies to that unique characteristic, since the regulation could not deny equal rights to the sex not possessing this characteristic. Conversely, only when a characteristic is found in members of both sexes, a regulation must not make determinations or classifications based on sex or sex stereotypes but instead must consider the individual capability or classification.

It is thus undisputable that the statutory prohibition against sex discrimination does not embrace an employer's regulation which denies pregnancy and maternity benefits to female employees where this regulation is rationally related to the objective of the employer's benefit plan.

III.

THE STATE STATUTE EXCLUDING MATERNITY BENEFITS FROM AN INSURANCE PROGRAM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A regulation is measured against the Fourteenth Amendment when it creates a classification of individuals and then treats the individuals in this classification differently than other persons are treated. However, as Justice Frankfurter observed, "classification is inherent in legislation"; the Equal Protection Clause has not forbidden it.[36] Consistent with these observations, this Court has stated that the Equal Protection Clause does not forbid all statutory classification or discrimination, but only that discrimination that can be called arbitrary or invidious.[37] These observations were amplified by the illuminating discussion of Chief Justice Burger in *Reed* v. *Reed, supra.* There, a state statute gave mandatory preference for the male when both a male and a female otherwise equally entitled ap-

36. *Morey* v. *Doud,* 354 U. S. 457, 472 (1957).

37. "The Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955); *Morey* v. *Doud, supra; Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61.

plied for letters of administration of a decedent's estate. The Chief Justice observed:

> "[T]his Court consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike . . .'" at 75-76.[38]

Because this Court has interpreted the Equal Protection Clause as proscribing only arbitrary and invidious statutory discrimination, this Court has developed tests to determine whether or not a regulation creates an arbitrary or invidious discrimination; these tests have been called the "rational basis" or "compelling state interest" tests.

---

38. The lower courts, too, have recognized that legislative and administrative enactments may treat different classes of persons in different ways without offending the Equal Protection Clause. In *Williams* v. *McNair*, 316 F. Supp. 134, 136 (DC DC, 1970), affirmed 401 U. S. 951, the Court stated:

> "The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination.

The rational basis test has been generally employed when this Court has looked to the Equal Protection Clause in considering the constitutionality of a state's regulation. Under this standard of review, a state legislature is accorded considerable discretion in enacting regulations and is presumed to have acted within its constitutional power. A "legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[39] The compelling state interest test, considered by this Court to be an exception to the usual standard of review expressed in the rational basis test, has been utilized by this Court only to review legislative enactments that abridged fundamental constitutional rights[40] or that involved classifications that can be labeled as "suspect".[41] This standard of review does not accord to legislative

39. *Frontiero* v. *Richardson, supra,* 1768 (1973); *Lindsley* v. *National Carbonic Gas Co., supra,* at 78-79; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573 (1938); *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1960).

40. *San Antonio Independent School District* v. *Rodriguez,* 93 S. Ct. 1278 (1973). There, this Court defined a fundamental right as a right that is "explicitly or implicitly guaranteed by the Constitution." In the earlier case of *Shapiro* v. *Thompson, supra,* Justice Stewart's observations are consistent with those of the court in *Rodriguez*:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

41. *Frontiero* v. *Richardson, supra* (1973); *Shapero* v. *Thompson,* 394 U. S. 618 (1969); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Graham* v. *Richardson,* 403 U. S. 365 (1971); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944). These cases teach that when a statute creates a classification that is based upon "an

judgments the usual presumption of validity and requires that the state rather than the complainants justify discrimination found in the enactment by showing that a compelling state need is promoted by this discrimination.[42]

B. The Statute Excluding Maternity Benefits from the Benefit Program Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

1. The Statute Neither Creates Nor Involves a Suspect Classification.

Whether or not sex is a suspect classification, the statute requiring that maternity benefits be excluded from the benefit program does not create a classification based upon sex. Discrimination based upon a sex classification can occur only when persons similarly circumstanced are treated unequally based solely upon sex. See arguments presented *supra* in part II, D; *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Phillips* v. *Marietta supra.* Regulations concerned with physical characteristics unique to one sex, such as child-bearing do not contravene either the Constitution or Title VII.

This had been recognized by the E. E. O. C. for several years, and has been recently recognized by leading proponents of the proposed Equal Rights Amendment to the Constitution:

> "Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals

---

immutable characteristic determined solely by the accident of birth," and then imposes special disabilities upon members of that classification, the classification has been treated as suspect, subjected to strict judicial scrutiny, and allowed only if shown to be necessary to promote a compelling governmental interest. This Court has held that race, alienage and national origin are inherently suspect because these characteristics frequently bear "no relation to ability to perform or contribute to society." *Frontiero* v. *Richardson supra,* 1770.

42. *Frontiero* v. *Richardson, supra; Shapero* v. *Thompson, supra; McLaughlin* v. *Florida, supra; Graham* v. *Richardson, supra; Korematsu* v. *United States, supra.*

> with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex." (Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., on H. J. Res. 35, 208, and Related Bills and H. R. 916 and Related Bills 40 (1971).)

Furthermore, even if sex is to be considered to be a suspect classification because it is an immutable characteristic determined solely by the accident of birth and because it bears no relation to ability to perform or contribute to society,[43] pregnancy, unlike sex, is not an immutable characteristic and it cannot be said that pregnancy bears no relation to ability to perform or to contribute to society. Consequently, following the reasoning in *Frontiero* it is clear that pregnancy cannot be a suspect classification even though sex, race, and national origin may be.

The basis of the holding in *Frontiero* is a further reason to distinguish that case from the instant case. In *Frontiero*, this Court added:

> ". . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . .' We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process clause of the Fifth Amendment in so far as they require a female member to prove the dependency of her husband." (at 1772.)

---

43. Where the sole basis for a classification created by a statute was the sex of the individual involved, four Justices of this Court found the classification inherently suspect and subjected it to close scrutiny. *Frontiero* v. *Richardson, supra.*

Under the rationale of *Frontiero*, then, a regulation that treats men and women differently, would violate the Fourteenth Amendment only if it were maintained for the sole purpose of achieving administrative convenience. In the instant case, not only is the classification created by the exclusion of maternity benefits not sex based or suspect, but as a further distinction between this case and *Frontiero*, the purpose of the exclusion is not administrative convenience. Rather, the main purpose for the exclusion is to preserve the solvency of the benefit program as discussed by appellant in detail. Consequently, because administrative convenience is not the purpose of the statutory exclusion of maternity benefits, following *Frontiero* the statute does not violate the Equal Protection Clause.

Because the Statute does not create a suspect classification, the compelling interest test can be utilized to review the constitutionality of the statute which excludes maternity benefits from disability insurance programs only if that exclusion abridges a fundamental constitutional right.

2. The Exclusion of Maternity Benefits Does Not Abridge Fundamental Constitutional Rights.

This Court in rejecting the opportunity to create "substantive constitutional rights in the name of guaranteeing equal protection of the laws [,]" has stated that the key to discovering whether a right is "fundamental" lies not in its social significance but rather in determining whether the right is explicitly or implicitly guaranteed by the Constitution.[44]

It is difficult to imagine what fundamental right is abridged by the State's regulation excluding maternity benefits from its disability insurance program. If the right to bear children is a fundamental right it is in no way abridged by the State's regulation. Women bear children every moment without any hope of receiving maternity benefits from any source. Nor is there any

44. *San Antonio Independent School District* v. *Rodriguez*, *supra*, at 1297.

interference with the right to employment if that right is considered to be fundamental.[45]

3. The Statute Denying Maternity Benefits Under the State Benefit Program Does Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Its Constitutionality.

The rational basis test employs three standards: first, a legitimate governmental purpose must be found to exist; second, the classification created by the statute must be rationally related to and further this legitimate governmental interest; third, all persons within the class must be treated alike.[46]

The benefit program has an objective to provide the broadest coverage and maximum benefits at the least cost to employees. Maternity benefits are excluded because the State believes, based upon study and deliberation that this exclusion is necessary if

45. In *Dandridge* v. *Williams, supra,* this Court recognized that the usual rational basis standard was to be employed when evaluating the constitutionality of state legislation that restricted the availability of employment opportunities. This recognition indicates that the right to employment opportunities is not a fundamental constitutional right requiring added protection by the application of the compelling interest test. *Dandridge* cited with approval *Goesaert* v. *Clarie,* 335 U. S. 464 (1948) and *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U. S. 552 (1947). In *Goesaert,* this Court upheld a state statute prohibiting women other than wives and daughters of bar owners from becoming bar maids.

Consistent with the opinions of this Court is the Sixth Circuit's opinion in *Orr* v. *Trinter,* 444 F . 2d 128 (1971) cert. denied 408 U. S. 943 (1972), rehearing denied ..... U. S. ..... In *Orr,* a public school teacher alleged that his constitutional rights were violated because the School Board without reason refused to renew his teaching contract. He asserted that the Fourteenth Amendment prevented the State from depriving him of life, liberty and property without due process. While this was a case arising under the Due Process Clause, the court nonetheless in a statement relevant to these proceedings held that there is "no constitutionally protected right to government employment." at 133, 134.

46. *United States Department of Agriculture* v. *Moreno,* 93 S. Ct. 2821 (1973); *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412 (1920); *Frontiero* v. *Richardson, supra.*

the program is to remain solvent and meet its objectives. This has been set forth in detail by the appellant. Both the desire to keep the program solvent and the broader objective to provide disability benefits are valid State objectives. Exclusion of maternity benefits is necessary in the State's reasonable judgment to achieve those objectives. Consequently, it is clear that the State's regulation meets the standards of the traditional or reasonable basis test and the classification created by the regulation does not violate the Equal Protection Clause even though the regulation results in different classes of persons being treated in different ways.

While California excludes maternity benefits from its benefit program and while other states such as New Jersey and Rhode Island limit maternity payments to a fixed period[47] this difference merely reflects the individual judgment of the state legislatures. Such legislative discretion has been respected by this Court.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results, in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70."

Whether a state should require a fixed period for maternity benefits or completely exclude maternity benefits from a benefit program depends upon many variables such as population that are best known to the legislature of each state. An application of the reasonable basis test by this Court when it determines the constitutionality of a statute, such as that involved in this case,

---

47. Summary of State Labor Laws, U. S. Department of Labor, March, 1969.

will allow a state legislature to continue to exercise this discretion in a manner calculated to maintain the fiscal integrity of its benefit program and to achieve maximum benefit for all its citizens. However, application of the stricter standard of review may well foreclose any legislative discretion and by requiring the state to pay maternity benefits in the same manner as it compensates for illness or injury drastically curtail benefit programs. Indeed, as the dissenting opinion of Williams, District Judge, in the court below sets forth in detail, California's benefit program would be in jeopardy of insolvency if the State could not exclude maternity benefits from this program. In order that a state may continue to provide the broadest insurance coverage and maximum benefits within the limits of a reasonable employee contribution, this Court should apply the rational basis test when it evaluates the constitutionality of statutes such as the statute in the instant case. When this test is applied, the constitutionality of the statute in this case is assured.[48]

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

GERARD C. SMETANA,
Suite 6800,
233 South Wacker Drive,
Chicago, Illinois 60684,

LAWRENCE D. EHRLICH,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

48. The Amicus agrees not only with the conclusions reached by the appellant, but also with the arguments advanced by him.

APPENDIX.

Excerpts from the Official Transcript of Proceedings in Gilbert v. General Electric Company, No. 142-72-R, United States District Court for the Eastern District of Virginia:

* * * * *

[542] CHARLES DUNCAN was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

[549] *Direct Examination by Mr. Strauss.*

Q. Mr. Duncan, what is your occupation or profession?

A. I am an attorney at law admitted to practice in the District of Columbia.

[550] Q. Are you an officer of the District of Columbia Bar?

A. Yes. We have a unified D. C. Bar and I am this year President of that organization.

[551] Q. You were, were you not, at one time, employed by the EEOC?

A. Yes, I was.

Q. And in what capacity were you so employed?

A. I was General Counsel of the Equal Employment Opportunity Commission.

Q. And would you pinpoint the dates?

A. I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q. You just don't remember, but in view—

A. It was sometime very late in October.

Q. In October, 1966?

A. That is correct.

* * * * *

[563] Q. Would you look at the last sentence, please, in the November 15 letter?

A. Yes.

Q. Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A. Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q. Pay continuation, are you saying?

A. Yes.

Q. During pregnancy?

A. Yes. During the absence.

Q. Whether or not the pregnancy was covered by a disability policy, is that what this refers to?

A. No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be [564] it under company policy or under various sickness and health plans.

Q. Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof?

A. Yes.

Q. I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A. No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

* * * * *

[566] Q. Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972?

A. Yes, I have.

Q. How recently was that?

A. As recently as today.

Q. You were then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities?

A. Yes.

Q. Now, in 1966 when the policy formulated in the letter we have here was taking place, was there any discussion within the Commission of a policy such as appears in the 1972 guidelines?

A. I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy [567] on this point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q. And rejected?

A. Well, the Commission's policy was as these letters state.

Q. So that this may be clear, may have been evident, but I presume then that when the so-called 1972 policy was dis-

cussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time?

A. I am sure it was. I don't specifically remember that.

* * * * *